IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 730 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

STATE OF GUJARAT
Versus
DARJI VIJAY PRABHUDAS

Appearance:
1. Criminal Appeal No. 730 of 1992
MR KP RAVAL APP for Petitioner No. 1
MR JD AJMERA for Respondent No. 1 and 3
Respondent no. 2 served.

CORAM : MR.JUSTICE D.K.TRIVEDI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 24/06/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE D.K.TRIVEDI)

The appellant State of Gujarat has challenged the order of acquittal of the respondents accused passed by

learned Additional Sessions Judge, Morbi while disposing of Sessions Case No. 29 of 1990, wherein, learned Additional Sessions Judge, Morbi after appreciating the evidence led by the prosecution and considering the defence of the accused, has acquitted the accused from the offences punishable under Sections 8, 18, 21 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as "the NDPS Act" for short) as well as original accused no. 4 from the said act for the same offences including Section 29 of the Act.

2. Mr. Raval, learned APP while arguing the matter has taken us through the evidence, consisting oral as well as documentary evidence as well as judgement under challenge, has contended that the learned Trial Judge has committed error in appreciating the said evidence, which has resulted into miscarriage of justice. However, after arguing the matter, he could not assail the judgement and order of acquittal recorded by the learned Trial Judge against the original accused no 4 - Rajput Mafatlal Mavjibhai - present respondent no. 4. It is the contention of Mr. Raval that in view of the evidence led by the prosecution, the prosecution has established the fact that at the time when the raid was carried out as per secret information received by Shri S.C. Dave, who was at the relevant time attached with the Morbi City Police Station, he has taken all steps as provided under the Act and proceeded for raid as per the secret information. It is the contention of Mr. Raval that as found from the evidence that when the raiding party has reached as per the information at the raiding place i.e. at Sikwera Tailors, near Old Mahajan Sheri No. 2, behind Chitrakut Cinema, the accused no. 1 and 2 namely, Vijay Prabhudas and Udesinh Dhulasinh were found present and when inquiry was made from them and when personal search was carried out in presence of panchas, nothing was found and thereafter, two plastic packets were found in a bag (bagal thela) containing some substance and the said substance was identified as narcotic substance namely opium and Heroin. It is the case of Mr. Raval that Heroin was found from the accused no. 2, who came from Madhya Pradesh. The said substances were seized under the panchnama by following requirements of law and the said muddamal was sent to Chemical Examiner and as found from the report of the laboratory, the said substance was found as narcotic substance. According to Mr. Raval this fact proved that as per the secret information received by Shri Dave, the narcotic substance was found from the accused no. 2 and the learned Trial Judge has misread the evidence. According to him, panch witnesses examined by the prosecution have also supported the

prosecution case. However, learned Trial Judge has while not accepting the said evidence has committed error in acquitting the accused and prayed for setting aside the order of acquittal recorded by the learned Trial Judge.

3. Mr. Ajmera, learned advocate for the respondent Nos. 1 and 3 has supported the judgement as according to Mr. Ajmera the learned Trial Judge has rightly while appreciating the evidence has held that the prosecution has failed to establish the case against the accused and once the order of acquittal is passed by appreciating the evidence, according to Mr. Ajmera, considering the catena of judgements of the Apex Court, this court will not turn acquittal order into an order of conviction. Accordingly, he prayed for dismissal of the appeal. Accused no. 2 Padhiyar Udesinh Dhulsinh though served, has chosen not to participate in this proceedings.

4. On considering the submissions and on going through the evidence and judgement, as found from the record, the respondent nos. 1 and 2 are the original accused Nos. 1 and 2, while respondent no. 3 - original accused no. 4 and original accused no. 3 namely Rajput Devising Dhansing was during the trial was absconding and accordingly, trial is proceeded only against present respondents namely original accused Nos. 1, 2 and 4.

5. To appreciate the contention of Mr. Raval and as found from the evidence, it is the prosecution case that a secret information was received by Shri S.C. Dave, P.S.I., who attached to City Police Station on 9.9.1990. The information reveals that behind Chitrakut Theater in a shop namely "Sikwera Tailor" Vijay Prabhudas and Udesing Dhulasing i.e. accused Nos. 1 and 2 were present and had kept illegally in their possession the narcotic substance namely opium and Heroin and they are dealing with the narcotic substance. Accused no. 2 came from Madhya Pradesh is having heroin and both the accused are sitting in the said shop. After the information was received, the said information was registered in the station diary at 15.30 hours. Shri Dave has informed the said information to his superior officer i.e. Dy. S.P. Shri Patel and thereafter, he made an arrangement for securing the presence of panchas. Shri Dave, alongwith P.S.I. Desai and Writer Mr. Tank were called in the police station. Thereafter two panchas namely Bharatsing Juvanji and Hasubhai Nandlal were called and they have been apprised of the information, for which raid was to be carried out. Both the panchas have agreed to act as panchas. Thereafter, personal search of the panchas was made and preliminary panchnama was made. Thereafter, the

raiding party had proceeded towards the place indicated by the informant through jail road, Vegetable market and came near railway station road and came to Chitrakut Cinema. After parking the police jeep, they proceeded towards Sikwera Tailors shop. On reaching at the shop, they have disclosed their identity before the two persons, who are present in the shop. These two persons are accused Nos.1 and 2. They have also disclosed their identity and informed that they want to carry out search as they are keeping some narcotic substance. They have also asked both the accused that whether they want to carry out their search by securing the presence of Magistrate or Gazetted Officer. However, both the accused have declined to get their searched before the Magistrate or Gazetted officer. Thereafter, Shri Dave had carried out personal search of accused and during such search, nothing was found from the possession of both the accused namely respondent Nos. 1 and 2. However, from the drawer of the table, one bag (bagal thela) was found, in which, two plastic bags were found containing brownish powder in one bag and in another bag white powder was found. Accused no. 2 Udesing has disclosed that brown powder is an opium. Panch Hasubhai Nandlal has also brought scale and said bag was weighed and it was found that the said two bags contained 266 gram and 500 ml. gram of opium and in the another packet 18 gram and 500 ml. gram heroin was found. Out of these two samples, two samples of 25-25 grams and 6-6 grams samples of each were taken out in presence of panchas and the said samples were sealed in the presence of panch witnesses. The signatures of the accused and signatures of panch witnesses were taken and the said samples were kept separately in an envelope and sealing was done in presence of panchas. The accused could not produce any pass or permit for the said substance and the panchnama was drawn. Thereafter, the accused were arrested. P.S.I. Shri Dave after returning to the police station, had filed complaint and report was sent to the PSI Rural. Thereafter arrangement was made for sending the muddamal for analysis before the Chemical Examiner. Shri Dave has recorded the statements of the witnesses and he interrogated the accused. As per the order of the D.S.P., the investigation of the case was handed over by Shri Dave in favour of P.S.I. Shri Ninama. After completion of the investigation, the chargesheet was filed against the accused persons.

6. On going through the record, it transpires that evidence of PSI Shri Laxmansinh Kodarji Katara - P.W. 10 was recorded. He has deposed before the Court that he was on duty at Panigate Police Chowki at Vadodara, and he

has arrested one accused namely Mafatlal Mavji as per Yadi received from P.S.I. Morbi on 23rd October, 1990 and after arresting the said accused - Mafatlal Mavji, he gave message at Rajkot and some police officers from Rajkot had come to receive the accused. In cross examination of Shri Katara, he in term has deposed that he has not made any panchnama for the arrest of said accused - Mafatlal Mavji. The evidence of P.W.-10 Shri Katara was recorded at Ex. 58.

7. From the record, it is found that an application Ex. 59 was submitted by the learned Public Prosecutor for seeking permission to examine the witnesses who are present before the Court highlighting that accused no. 1 - Darji Vijay Prabhulal is a tenant of one Meman Daud Suleman, who is staying with his family on the said premises i.e. above the shop, who is issuing receipt for receiving payment of rent in a receipt book and the father of accused Vijay has died. The receipt is in the name of father of Vijay is brought and copies of such xerox copy is also given to the accused and accordingly, permission to examine the witnesses under Section 173 (8) of Cr.P.C. be granted or alternatively, as provided under Section 311 of the Cr.P.C., other witnesses, who are present be permitted to examine. It is further highlighted in the said application that the names of the persons who are present in the court, their names are not highlighted in the chargesheet and no statements of the witnesses were recorded and accordingly, permission to examine the witnesses be granted. The said application was endorsed by the advocate for the defence by stating that the list of witnesses submitted by the Public Prosecutor, the names of the persons, for which the prosecution intends to examine before the Court, their names are not disclosed, neither their statements are recorded by the police and their names are not highlighted in the chargesheet filed before the Court. Further, it is the say of the defence that in the cross examination of the evidence of Shri Patel, Dy.S.P., the defence has pause a question about the possession of the shop. The prosecution has brought the witnesses without any summons as instructed by the learned Public Prosecutor and if the permission is granted, it will prejudice to their defence. The learned Trial Judge has fixed the hearing of the application and as found from the order passed by the learned Trial Judge dated 3.3.1992, the learned Judge has on considering the application of the prosecution and submissions made before him and examining the provisions of Sections 173 (8) and 311 of the Cr. P.C. has rejected the said application.

8. It is further found from the record that after the said application was rejected by the learned Trial Judge, a request was made by Ld. Public Prosecutor for time with a view to challenge the said order and considering the request made by learned Public Prosecutor, the learned Additional Sessions Judge has also granted the request made by learned Public Prosecutor by adjourning the matter. However, there is nothing to indicate from the record that though the time was granted by the learned Additional Sessions Judge, the prosecution has challenged the said order and it is thereafter, the evidence of the Investigating Officer / complainant Shri Dave was recorded.

9. As found from the evidence of Mr. Dave that he has received the secret information and on receiving the said information, he has informed to Shri Patel, Dy.S.P. and all the steps were taken by him for securing presence of two panchas and to proceed with the raiding party towards Sikwera Tailors Shop, Nr. Chitrakut Cinema. As found from the cross-examination of Shri Dave, he has admitted that he has not recorded any statement of Daud Suleman, who was the owner of the shop and he has also not joined Daud Suleman as witness for the prosecution in chargesheet. He has further admitted that he has not collected any documentary evidence in respect of rent receipt before filing chargesheet in respect of Shri Prabhudas, who has taken the said shop on rent. Shri Dave - the Investigating Officer has in term admitted in cross examination that no name of accused no. 4 is shown in the FIR and further that no evidence was found against accused no. 4.

10. On examining the evidence of the prosecution witnesses and the documentary evidence on the record of the case and on close scrutiny of the evidence of the witnesses and more particularly the evidence of Shri Dave, who is present and who has received secrete information and also one of the members of the raiding party, it is found that as per the secret information received by him, after making all arrangement including securing presence of panch witnesses, they have proceed for raid. As found from the evidence, as per secrete information received by Mr. Dave, accused no. 1 - Vijay Prabhudas and accused no. 2 Udesing Dhulsing, who is resident of Madhya Pradesh were present in the tailor's shop known as "Sekwera Tailor". Panchnama further shows that nothing was found personally from the accused when personal search was carried out by the raiding party in presence of panchas. There is nothing on record to

suggest that after the personal search was carried out, any of the accused has taken out a bagal thela from the drawer of the table on the contrary, it is found that P.S.I. Dave has while opening the drawer of the table he found one bagal thela, wherein, two plastic bags were found and it is further found that these two bags are having narcotics substance and thereafter, the said substance was seized. No evidence of expert was led by the prosecution in respect of the examination of the substance. The prosecution has also not led any evidence to show that after the search and seizure and after arresting the accused, muddamal seized were handed over to P.S.I. and from there, the said substance was sent to the Chemical Examiner for examination. The report of the Chemical Examiner is as under :-

"(1) The opiate alkaloids - morphine, Codeine, thibein, papavarine and narcotine are detected in the exhibit marked - A1. The exhibit marked - A1 contained 7.8% w/w of morphine anhydrous.

(2) The alkaloide - strychnine detected in the exhibit marked - B1. The Heroin (Diacetyle morphine) could not be detected in the exhibit marked - B1."

11. On close scrutiny of the evidence, we are of the view that the prosecution has failed to establish the case against the respondent accused to connect with the substance seized by the police. It is also to be noted that the defence of the accused no. 1 was to the effect that at the time when the raiding party reached at the shop, the accused Vijay has told him that he came at the shop to collect the cloths, which was given for stitching. The learned Trial Judge has while scrutinising the evidence of the prosecution witnesses and considering the defence of the accused and on examining the various judgements of the Apex Court, has held that the prosecution has failed to establish the case against the accused that the accused were found with the Narcotic substance, the learned Trial Judge has accordingly recorded the order of acquittal against the accused.

12. Even after reappreciating the evidence and on considering the contentions raised before us, it is difficult for us to accept the contention of learned APP that the learned Trial Judge has committed any error while recording the order of acquittal against the accused. In our view, this is not a matter, where the

order of acquittal recorded by the learned Trial Judge deserve to be set aside by converting the order of acquittal into conviction.

13. In our view, the acquittal appeal filed by the State is dismissed. The order of acquittal passed by Additional Sessions Judge, Morbi dated 12.5.1992 in Sessions Case No. 29 of 1990 acquitting the accused for the offences punishable under the NDPS Act is hereby confirmed. Bailable warrants issued against respondents-accused are accordingly discharged, if any.

(D .K.Trivedi,J.)

(H.H.Mehta, J.)

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